

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MONTE C. HOISINGTON,

Petitioner,

v.

HENRY RICHARDS,

Respondent.

Case No. C05-5642RBL

REPORT AND
RECOMMENDATION TO
DISMISS PETITION
WITHOUT PREJUDICE

**NOTED FOR:
April 7th, 2006**

This case has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B). Petitioner seeks relief pursuant to 28 U.S.C. § 2254. Before the court is petitioner's motion to dismiss the petition without prejudice to pursue state remedies. (Dkt. # 15). Respondent does not oppose the motion and characterizes the motion as one brought under Fed. R. Civ. P 41 (a). (Dkt. # 16).

After reviewing plaintiff's motion, the pleadings made in support thereof, defendants' response, and the remaining record, the Court should **GRANT** the motion and dismiss this matter without prejudice.

DISCUSSION

Under Rule 41, a plaintiff has the right to voluntarily dismiss his case when no answer or motion for summary judgment has been filed by an adverse party. Rule 41(a)(1) specifically provides that dismissal as a matter of right can be foreclosed only by the filing of an answer or a motion for summary judgment. Roddy v. Dendy, 141 F.R.D. 261, 262 (S.D. Mississippi, 1992). Unlike a Rule 41(a)(1) dismissal, a Rule 41(a)(2) dismissal requires court approval and is only effective "upon such terms and conditions as the court deems

proper." Fed.R.Civ.P. 41(a)(2); Stevedoring Servs. of Am. v. Armilla Int'l B.V., 889 F.2d 919, 921 (9th Cir.1989). When ruling on a motion to dismiss without prejudice, the district court must determine whether the respondent will suffer some plain legal prejudice as a result of the dismissal. Hyde & Drath v. Baker, 24 F.3d 1162, 1169 (9th Cir.1994); Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 145 (9th Cir.1982). Here, the respondent does not oppose the motion.

CONCLUSION

Petitioner's request to voluntarily dismiss his petition should be **GRANTED**. A proposed order accompanies this report and recommendation.

Dated this 13th day of March, 2006.

/s/ J. Kelley Arnold
J. Kelley Arnold
United States Magistrate Judge